

EYAK CORP.

IBLA 88-71

Decided March 20, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, determining status of lands under section 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and rejecting Native village corporation selection application in part with respect to land embraced within a Federal installation. AA-8447-A2, AA-16150.

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands--Alaska
Native Claims Settlement Act: Native Land Selections: Selection
Limitations

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). The excepted land must be in actual use on Dec. 18, 1971, and throughout the selection period. Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by a non-Governmental entity is properly excluded from conveyance if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue. A decision to exclude a tract may be reversed where it appears from the record that use of the tract was no longer required for the purposes of the Federal agency.

APPEARANCES: Robert S. Spitzfaden, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Eyak Corporation has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 28, 1987, rejecting in part selection application AA-8447-A2 because it included land embraced in a Federal installation.

Section 11(a) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), as amended, 43 U.S.C. § 1610(a) (1982), withdrew "public lands" in townships enclosing certain identified Native villages and certain townships contiguous or proximate thereto from appropriation under public land laws on December 18, 1971. These "public lands" were made available for selection by Native corporations under section 12 of ANCSA, 43 U.S.C. § 1611 (1982). On December 17, 1975, appellant filed selection application AA-8447-A2 on behalf of the Native village of Eyak for the surface estate of certain lands in the Chugach National Forest located in protracted T. 17 S., R. 5 W., Copper River Meridian, pursuant to section 12(b) of ANCSA, 43 U.S.C. § 1611(b) (1982). The selected lands included lands within the Boswell Bay Radio Relay Site located on Hichinbrook Island.

Under section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1982), "public lands" available for ANCSA selection include "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation * * *." (Emphasis added.) The issue raised by this appeal is whether the lands encompassing the Boswell Bay Radio Relay Site are public lands eligible for selection, or are excluded because of use of the land in connection with a Federal installation.

The Boswell Bay Radio Relay Site was constructed in 1957 by the United States Army Corps of Engineers (COE) for use by the United States Air Force (USAF) on land administered by the United States Forest Service (FS). 1/ The primary purpose of the radio relay station was to establish three-way contact between Neklason Lake, Cape Yakataga, and Middleton Island in order to provide essential military communication with USAF bases throughout Alaska and to support a link with the remote distant early warning line radar stations beyond the Arctic Circle. The system also served other military and civilian Government agencies, as well as the general public through the Alaska Communication System.

By separate leases effective July 1, 1974, USAF leased both the real property and the personal property comprising the Boswell Bay Radio Relay Site to RCA Alaska Communications, Inc. (Alascom), a private corporation. The two leases, dated June 19, 1974, recite that the leased property "is not for the time needed for public use" (Statement of Reasons (SOR), Exh. A at 1, Exh. B at 1), and explicitly recognize USAF's decision to terminate operations "due to the elimination of Defense requirements for this particular communications facility" 2/ (SOR, Exh. A at 2, Exh. B at 2). It is

1/ The site was initially utilized pursuant to a special use permit issued by FS on Sept. 10, 1957. This permit was superseded by a 1969 memorandum of understanding which continued the use of the site.

2/ The original BLM case file does not contain copies of these leases. Copies of the leases were included as Exhibits A and B to appellant's SOR. Appellant has filed a motion to supplement the record to include the leases. BLM concurs with this motion. Accordingly, we grant the motion to supplement the record with copies of the two leases.

expressly recognized in the personal property lease that the "facilities are being made available for Lease as a means of continuing reliable communications to the public temporarily pending establishment of modern replacement facilities" (SOR, Exh. B at 18).

The personal property lease, while stating that USAF no longer requires the site to fulfill its telecommunication needs, nevertheless provides for the lease-back by the Department of Defense of 55 voice-grade interstate circuits for up to 12 months in order to offset possible cost impacts to the public customers of Alascom caused by the cessation of USAF use of the facility (SOR, Exh. B at 19-20). The 12-month period ended July 1, 1975.

Alascom continued to operate the Boswell Bay Radio Relay Site under USAF contract until 1980 to provide a two-way tropospheric system between Neklason Lake and Cape Yakataga. In 1980 USAF sold the facility to Alascom.

By notice issued May 13, 1983, BLM requested the COE to provide a "justification" for retaining the Boswell Bay site in Federal ownership, pursuant to section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1982). This review was serialized as section 3(e) case file AA-16150. On August 2, 1983, the COE responded, enclosing a USAF letter dated July 26, 1983, which contained the requested information to support the section 3(e) determination. The letter declared that Federal use of the land began in 1957 with the construction of the radio-relay site, and that as of December 18, 1971, USAF used the Boswell Bay Radio Relay Site as a communication center. Appellant responded to the "justification" and denied that USAF had any need for the facility.

In a June 28, 1985, memorandum, BLM made a preliminary determination on the section 3(e) issue. BLM found that the tract of land involved consisted of six parcels containing approximately 107.56 acres. BLM determined that approximately 69.93 acres located in three different parcels comprised the smallest practicable tract actually used by USAF for the radio-relay site and should be retained in Federal ownership. BLM decided that the remaining 37.63 acres were public lands within the meaning of section 3(e), and should be conveyed to appellant. BLM also recommended that various easements be reserved. This preliminary determination was amended on April 17, 1987, but the acreage retained remained the same.

Appellant commented on the preliminary determination by letter dated August 19, 1986, arguing that USAF had discontinued its use of the site in June 1974 when it leased the site to Alascom. Furthermore, appellant contended that Alascom's use of the site did not have a direct, necessary, or substantial connection to the purpose of USAF, and that, while the site was leased to Alascom, the site was used by USAF as rental property to derive revenue, as well as by Alascom to derive income. BLM responded to this letter, explaining that it considered Alascom's use of the site to have the requisite connection to the purpose of USAF, partially because of USAF's lease-back of 55 voice-grade interstate circuits. BLM also concluded that the site was not used primarily to derive revenue.

By decision dated September 28, 1987, the Alaska State Office, BLM, rejected in part appellant's village selection application. The preliminary conclusions set out in the June 28, 1985, memorandum, as amended April 17, 1987, are virtually unchanged in this decision.

In its SOR for appeal, appellant concedes that the use of the Boswell Bay Radio Relay Site by USAF on December 18, 1971, was directly and necessarily connected to the purpose of USAF, thus satisfying the requirement of 43 CFR 2655.2(a)(1). Appellant contends, however, that the issuance of the leases to Alascom in June 1974 discontinued USAF's use of the site during appellant's selection period, resulting in the use not being continuous as required by 43 CFR 2655.2(a)(2). Appellant notes that, at the time the leases were entered into, there was no longer a military need for the communications facility, and argues that the type of use changed from military to civilian during appellant's selection period when the leases were issued. Appellant contends that the lease-back of the 55 voice-grade interstate circuits does not mandate a different conclusion because the stated purpose of the lease-back, to prevent an increased cost to the public, was unrelated to USAF's communication needs. Furthermore, because Alascom's function and use are different from those of USAF, appellant alleges that the requirements of 43 CFR 2655.2(a)(3) have not been met and that the Boswell Bay lands do not meet the requirements of section 3(e) and must be conveyed to appellant.

Appellant further argues that Alascom's use of the site cannot be relied on to establish that the site should be retained pursuant to 43 CFR 2655.2(b)(3)(v) because that use did not have a direct, necessary, and substantial connection to the purpose of USAF. Once again appellant notes that the lease-back of the 55 circuits was to secure a freeze on Alascom's prices for the benefit of the general public. Furthermore, the lease-back only lasted for a maximum of 12 months, *i.e.*, until July 1, 1975. Because appellant's selection period did not end until December 18, 1975, the lease-back arrangement did not provide for continuous use by USAF for the remainder of the selection period. Finally, appellant argues that because Alascom used the site primarily to generate revenues, its use does not satisfy the regulatory requirements.

In its answer, BLM agrees that the sole issue on appeal is the effect of the lease of the Boswell Bay site to Alascom on June 19, 1974, prior to the end of the relevant selection period. BLM frames the question as "[d]id the leasing of the site in 1974 make the tract 'public lands' available for conveyance under ANCSA or were the leases a sufficient continuation of the federal use throughout the selection period?" (Answer at 4). BLM argues that appellant's analysis of the different functions of USAF and Alascom are irrelevant to this issue. BLM contends that the effects of the leases on the continuity of the use of the site by USAF must be assessed based on whether Alascom's use of the site had a direct, necessary, and substantial connection to the purpose of USAF in accordance with 43 CFR 2655.2(b)(3)(v). According to BLM, the record, including the lease-back arrangement found in the lease, contains sufficient evidence to support a finding that the use by Alascom had the requisite connection to the purpose of USAF.

[1] As noted above, appellant's selection application was filed pursuant to section 12(b) of ANCSA, 43 U.S.C. § 1611(b) (1982), which provides that the selection shall be made from public lands withdrawn by section 1610(a) of ANCSA. Pursuant to section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1982), "public lands" subject to withdrawal and selection by Native village corporations do not include "the smallest practicable tract * * * enclosing land actually used in connection with the administration of a Federal installation."

The criteria for determining the smallest practicable site pursuant to section 3(e) of ANCSA are found in the regulation at 43 CFR Subpart 2655. The regulation at 43 CFR 2655.2 provides in pertinent part that BLM shall determine:

(a) Nature and time of use.

(1) If the holding agency used the lands for a purpose directly and necessarily connected with the federal agency as of December 18, 1971; 3/ and

(2) If the use was continuous, taking into account the type of use, throughout the appropriate selection period; and

(3) If the function of the holding agency is similar to that of the other Federal agency using the lands as of December 18, 1971.

With respect to the size of the tract, 43 CFR 2655.2(b)(1) provides that the tract "shall be no larger than reasonable necessary to support the agency's use." According to 43 CFR 2655.2(b)(3)(v), the tract may include "[1]ands used by a governmental entity or private person for a use that has a direct, necessary and substantial connection to the purpose of the holding agency but shall not include lands from which proceeds of the lease, permit, contract, or other means are used primarily to derive revenue."

Appellant concedes that USAF, as the holding agency, was using the lands at issue for a "purpose directly and necessarily connected with the Federal agency as of December 18, 1971." Appellant asserts, however, that the leasing of the Boswell Bay Radio Relay Site by USAF to Alascom in June 1974 discontinued USAF's use of that site. Because USAF did not use the site continuously throughout appellant's selection period, appellant argues that the tract is public land available for selection. We agree.

3/ "Holding agency" means any Federal agency claiming use of a tract of land subject to these regulations. 43 CFR 2655.0-

The appropriate period for section 12(b) selections is 4 years, i.e., from December 18, 1971, until December 18, 1975, 43 CFR 2651.3. The Board has held that it is use during the selection period which is dispositive of the question whether a Native village corporation is entitled to the land in the case of a section 3(e) determination, and it is immaterial what use, if any, is made of the land after the critical time period. Olgoonik Corp., 95 IBLA 80 (1986); Federal Aviation Administration, 83 IBLA 382 (1984); Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984). The leases to Alascom took effect on July 1, 1974, within appellant's selection period. Thus, USAF must rely on Alascom's use to establish that its use was continuous throughout the relevant period.

The regulations provide guidance regarding qualifying use by a non-Governmental entity. 4/ Such non-Governmental use must have "a direct, necessary and substantial connection to the purpose of the holding agency" to justify retaining the land utilized in Federal ownership. 43 CFR 2655.2(b)(3)(v). The leases at issue here, however, recognize that USAF no longer needed to use the communications facility to further its military purposes (SOR, Exh. A at 1-2, Exh. B at 1-2). Thus Alascom's use of the facility for civilian communications does not have the requisite connection to the military purpose of USAF. Kake Tribal Corp., 85 IBLA 165 (1985) (use of logging camp by private logging interest under permit from FS directly related to purposes of FS).

The lease-back provision in the personal property lease does not alter this conclusion (SOR, Exh. B at 19-20). The provision explicitly recognized that USAF no longer needed the A route to fulfill its military telecommunications requirements. The purpose of the lease-back of the 55 voicegrade circuits was to alleviate the shifting of the financial burden of operating the route to the public customers of Alascom, not to further military needs. Furthermore, the lease-back arrangement was in effect only for a period of up to 12 months, ending no later than July 1, 1975. Nothing in the record indicates that USAF used the facility in any way from July 1975 until December 18, 1975, the remainder of appellant's selection period. Thus, even if the lease-back arrangement was construed to continue the use of the lands by USAF, that use still concluded before the selection period ended. Because the record fails to support the conclusion that there was continuous Federal use of the Boswell Bay Radio Relay Site throughout appellant's selection period, BLM's decision must be reversed. 5/

4/ We agree with BLM that a comparison of the functions of Alascom and USAF is not relevant here because 43 CFR 2655.2(a)(3) applies only when there is a change in the Federal agency using the lands during the selection period, not when a non-Governmental entity begins using the lands.

5/ Our resolution of this issue makes it unnecessary to consider whether USAF used the leased land primarily to derive revenue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43
4.1, the decision appealed from is reversed, and the case is remanded to BLM.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge